

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 295 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

CHOKSHI TRADERS PVT.LTD.

Appearance:

MR MANISH R BHATT for Petitioner
SERVED for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

Date of decision: 03/02/98

ORAL JUDGEMENT

Per: R.K.Abichandani, J.

1. The Income-tax Appellate Tribunal, Ahmedabad has referred the following question for the opinion of this Court under section 256 (1) of the Income-tax Act, 1961.

"Whether, the Appellate Tribunal is right in law and facts in holding that if the unpaid sales tax liability is paid before the due date for filing of the return under sec. 139(1), no addition could be made invoking the provisions of sec. 43B of the I.T. Act?

2. The matter relates to the assessment year 1985-86. While making the income-tax assessment of the assessee Company, the Assessing Officer noted that there was unpaid sales tax liability of Rs. 30,123/- under the Gujarat Sales Tax Act and of Rs. 39,052/- under the Central Sales Tax Act, aggregating to Rs. 69,175/- at the end of the accounting period, and, invoking the provisions of section 43B of the said Act, allowed the said amount. The C.I.T. (Appeals) confirmed that order. The Appellate Tribunal in the appeal by the assessee following its earlier decision in the case of M/s. Chandulal Venichand and others vs. I.T.O., held that no addition could be made for the said sum of Rs.69,175/-. The case of Chandulal Venichand was carried to the High Court at the instance of the Revenue and this Court in C.I.T. vs. M/s. Chandulal Venichand & others reported in 209 ITR, page 7 while construing the provisions of section 43B of the said Act held that, the purpose underlying section 43B was to curb the practice of some taxpayers of not discharging their statutory liability such as in respect of excise duty, sales tax, employer's contribution to Provident Fund and Employees State Insurance Scheme for a long period of time and yet at the same time to take deduction for such amount while resorting to the mercantile method of accounting. It was held that the legislature has never intended that taxpayers who discharge their statutory liabilities within the prescribed time should be placed in a disadvantageous position. It was held that the first proviso which was inserted w.e.f. 1st April, 1988 in section 43B was added to mitigate hardship caused to the taxpayers because the sales tax for the last quarter cannot be paid during the previous year and under the provisions of section 43B, the payment of sales tax for the last quarter was getting unnecessarily disallowed. The Explanation 2 which was inserted in section 43B with retrospective effect from April 1, 1984 and the first proviso were required to be read harmoniously with section 43B and construed so as to advance the remedy intended by the statute. It was noted that the proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since sales tax for the last quarter cannot be paid within that previous year, the original provisions of section 43B will

unnecessarily involve disallowance of the payment for the last quarter. It was noted that Explanation 2 was added as certain courts had interpreted the provisions of section 43B in a manner which may negate the very operation of the section. It was held that by its very nature the proviso was in a declaratory form. The Court observed that it would be unreasonable to say that the sales tax payment for the last quarter should be made within the previous year. It was further observed that if Explanation 2 and clause (a) of section 43B are read together, it would mean that the deduction shall be allowed in computing income only in the year in which such sum is actually paid in respect of any sum payable by way of tax for which the assessee incurred liability in the previous year, even though such sum might not have been payable within that year, for example, under the Sales Tax Law. If the first proviso was not there, it was bound to cause untold hardship to the assessee, because practically it would be impossible for him to discharge sales tax liability of the last quarter in the previous year in which the liability was incurred. To obviate this hardship, as a remedial and curative measure, the first proviso is added. It was in terms held that even if it was not specifically provided that the proviso would come into operation from April 1, 1984, yet it was required to be held that the said proviso was a part and parcel of section 43B from the very beginning. The Division Bench therefore held that the first proviso to section 43B was retrospective in its operation. Explanation 2 to the said section was subject to the said proviso and the law as amended was applicable even for the assessment year 1984-85.

3. The provisions of section 43B (a), the 1st proviso to section 43B and explanation 2 to section 43B came to be construed by the Hon'ble Supreme Court in *Allied Motors (P) Ltd. v. C.I.T.* reported in 224 I.T.R. 677, and the Supreme Court reviewing the case law on the point in which divergent views were taken concurred with the opinion of this Court in the case of *Chandulal Venichand (supra)* and held that the first proviso was added in section 43B to obviate the unexpected outcome of section 43B whereby the assessee who had collected sales tax in the last quarter of the accounting year and deposited it in the treasury within the statutory period falling in the next accounting year, was not entitled to claim any deduction for it. It was held that this was not intended by section 43B. The first proviso therefore made it clear that section will not apply in relation to any sum which was actually paid by the assessee in the next accounting year, if it is

paid on or before the due date for furnishing the return of income in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment was furnished by the assessee alongwith the return. It was held that Explanation 2 was added with retrospective effect from April 1, 1984 for the purpose of removing any ambiguity about the term " any sum payable" under clause (a) of section 43B because the said expression " any sum payable" was open to the interpretation that the amount payable for a particular year should also be statutorily payable under the relevant statute in the same year. The Supreme Court held that section 43B (a), the first proviso to section 43B and Explanation 2 have to be read together as giving effect to the true intention of section 43B. Explanation 2 being retrospective, the first proviso was also to be so construed. Without the first proviso, the Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. It was held that the proviso supplied an obvious omission and but for this proviso, the ambit of section 43B would be unduly wide bringing within its scope those payments which were not intended to be prohibited from the category of permissible deductions. The first proviso to section 43B, it was held, had to be treated as retrospective. It will be noted that even Allied Motors (P) Ltd. (Supra) decided by the Supreme Court related to the assessment year 1984-85.

4. In view of the ratio in the decision of the Supreme Court in Allied Motors (P) Ltd.(supra), and the ratio of the decision of this Court in Chandulal Venichand's case (supra), we are of the view that the Tribunal was right in holding that if unpaid sales tax liability is paid before the due date for filing of the return under section 139(1), no addition could be made invoking the provisions of section 43B of the Income-tax Act. The question referred to us is, therefore, answered in the affirmative against the Revenue and in favour of the assessee. The Reference stands disposed off accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

Amp/-